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No. 11636
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

JOSEPH D. KOURY,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

AUG - 1 1947

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

THELEN, MARRIN, JOHNSON & BRIDGES

SAMUEL S. GILL

ROBERT H. SANDERS

215 West Sixth Street

Los Angeles 14, Calif.

For Appellee:

WEINSTEIN, BERTRAM & VOGEL

1151 S. Broadway

Los Angeles 15, Calif. [1*]

2 *Joshua Hendy Corporation, a corporation, vs.*

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 4747-RJ Civil

JOSEPH D. KOURY,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORP., a corporation,
tion,

Defendant.

COMPLAINT FOR WAGES AND LIQUIDATED
DAMAGES DUE UNDER THE FAIR LABOR
STANDARDS ACT OF 1938.

Plaintiff complains and alleges:

I.

Plaintiff brings this action on behalf of himself and other employees similarly situated, pursuant to Sec. 16 (b) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Cong, CH. 676, 52 Stat. 1060-1069 (1938), 29 U.S.C., Sec. 201-219), hereinafter referred to as the Act to recover overtime wages, liquidated damages and attorney's fees.

II.

Jurisdiction of this action is conferred upon the Court by Sec. 16 (b) of the Act and by Sec. 24 (8) of the Judicial Code (28 U.S.C. Sec. 41 (8)).

III.

Defendant is a corporation organized under the laws of [2] the State of California, authorized to do business

therein and having its principal place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court.

IV.

At all times mentioned herein, defendant was and now is engaged at its said place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court, in interstate commerce and in the production of goods, to-wit, ships, for interstate commerce within the meaning of the Act.

V.

From April, 1943, to and including July, 1944, defendant employed the plaintiff at its said place of business as an interpreter-recruiter, in which capacity plaintiff was employed by the defendant in interstate commerce, in the production of goods for interstate commerce, and in an occupation and in processes necessary to such production, all within the meaning of the Act.

VI.

For his services for the defendant as aforesaid, plaintiff received compensation from the defendant at hourly rates of pay of \$1.13 during a portion of his period of employment, and of \$1.20 during another portion of his period of employment, and during the remainder of his period of employment, received weekly compensation which paid for forty-eight hours worked per week. Said weekly compensation was the weekly equivalent of \$275.00 per month. At the present time defendant does not know the precise period of his employment in which he was employed at an hourly rate of \$1.13; in which he was employed at an hourly rate of \$1.20; and in which he received each week, for forty-eight hours worked, the weekly

equivalent of \$275.00 per month. The precise periods of employment at the respective rates of pay are contained in the records of plaintiff's employment by the defendant, which are in the possession of the defendant. [3]

VII.

In substantially every week during his employment by the defendant as aforesaid, plaintiff worked in excess of forty-eight hours. While he was employed at hourly rates, he received compensation at one and one-half the regular rate of pay at which he was employed for his hours worked in excess of forty, and up to and including forty-eight hours. While he was employed at a monthly rate of pay, he was paid at straight time only for all hours worked up to forty-eight. Neither while he was employed at hourly rates, nor while he was employed at a monthly rate, did he receive any compensation at all for his hours worked in excess of forty-eight.

VIII.

Plaintiff does not at the present time know the exact number of hours worked by him for the defendant during the period of his employment, as aforesaid, but said hours are known to the defendant and contained in the records of plaintiff's employment in the possession of the defendant.

IX.

There is now due, owing, and unpaid from the defendant to the plaintiff a sum equal to the product of one and one-half times his regular rate of pay and the hours

worked by him in excess of forty-eight during his entire period of employment, plus a sum equal to the product of one-half his regular rate of pay times the hours worked by him in excess of forty and to and including forty-eight while he was employed at a monthly rate of pay, plus an amount equal to said sums as liquidated damages.

X.

Sec. 16 (b) of the Act provided that the Court in this action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee to be paid by the defendant.

Wherefore, plaintiff prays judgment against the defendant [4] for a sum equivalent to the product of one and one-half times his regular rate of pay and the hours worked by him in excess of forty-eight during his entire period of employment, plus a sum equal to the product of one-half his regular rate of pay times the hours worked by him in excess of forty and to and including forty-eight while he was employed at a monthly rate of pay, for a further amount equal to said sums as liquidated damages, for a reasonable attorney's fee, for his costs of suit incurred herein, and for all proper relief.

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Plaintiff [5]

[Verified.]

[Endorsed]: Filed Sep. 4, 1945. [6]

[Title of District Court and Cause]

ANSWER TO COMPLAINT

Now comes the defendant herein and answers the complaint of the plaintiff herein, as follows:

I.

Answering the allegations contained in paragraph IV of said complaint, said defendant alleges that at all times mentioned in said complaint defendant was and now is engaged at Terminal Island, County of Los Angeles, State of California, in the production of ships for the United States Maritime Commission under cost-plus contracts up to January 1, 1945, and under a selective price contract since said date.

Except as herein expressly admitted, defendant denies each and every allegation contained in said paragraph IV.

II.

Answering the allegations contained in paragraph V of said complaint, said defendant alleges that said plaintiff was employed by said defendant as a laborer from April 28, 1942, until [7] May 27, 1942; as a laborer leadman from May 27, 1942, until August 1, 1943; as an interviewer from August 1, 1943, until January 16, 1944, and as a Recruiting Officer from January 16, 1944, until July 30, 1944, which said occupations were necessary to the production of said ships.

Except as herein expressly admitted, defendant denies each and every allegation of said paragraph V.

III.

Answering the allegations of paragraphs VI, VII and VIII of said complaint, defendant alleges that plaintiff

received compensation from the defendant at hourly rates of pay of eighty cents (80¢) during the period from April 28, 1942, until May 27, 1942; of ninety-five cents (95¢) during the period from May 27, 1942, until September 8, 1942; of One Dollar and three cents (\$1.03) during the period from September 8, 1942, until September 19, 1943; of One Dollar and Thirteen Cents (\$1.13) from September 19, 1943, until January 16, 1944; and received a monthly salary of \$275.00 for the period from January 16, 1944, until July 30, 1944. That in order to receive said monthly salary, it was the understanding between plaintiff and defendant that plaintiff was to be employed for a minimum of forty-eight hours per week and so long thereafter as necessary to perform his work. That the staff attendance records of defendant show that plaintiff was in attendance for forty-eight hours for each workweek from the week ending August 7, 1943, until the week ending January 16, 1944. For each of said workweeks plaintiff was paid at the rate of one and one-half times his hourly rate for all hours which said records show plaintiff was in attendance for hours in excess of forty hours per week. That during the period from January 16, 1944, until July 30, 1944, while plaintiff was employed at a monthly salary the staff attendance records of defendant show that plaintiff was in attendance for forty-eight hours for each of the weeks during said period, with the exceptions of the weeks [8] ending June 4, 1944, and June 11, 1944; that for each of said weeks, except the two last-mentioned, said plaintiff received as compensation the sum of \$63.46, which was the weekly equivalent of the monthly salary of \$275.00.

Except as herein expressly admitted, said defendant denies each and every allegation contained in paragraphs VI, VII and VIII of said complaint.

IV.

Answering the allegations contained in paragraph IX of said complaint, defendant denies each and every allegation contained in said paragraph IX.

For A Further, Separate And First Affirmative Defense, said defendant alleges that said plaintiff during the period while he was employed in the classification of Recruiting Officer was employed in an administrative capacity within the meaning of Section 13(a) of the Fair Labor Standards Act and the Regulations of the Wage and Hour Administrator issued pursuant thereto.

For A Further, Separate And Second Affirmative Defense, said defendant alleges that in respect to all claims of the said plaintiff which accrued three years prior to September 4, 1945, such are barred by the provisions of Section 338 of the California Code of Civil Procedure.

Wherefore, said defendant prays that plaintiff take nothing by his complaint, and that defendant have judgment for its costs of suit herein.

THELEN, MARRIN, JOHNSON & BRIDGES

By Samuel S. Gill

SAMUEL S. GILL

Attorneys for Defendant [9]

Received copy of the within Answer this 25th day September, 1945. Perry Bertram (b. f.) Attorney for Plaintiff.

[Endorsed]: Filed Sep. 25, 1945. [10]

[Title of District Court and Cause]

MINUTE ORDER.

Judge Weinberger's Calendar, Dec. 31, 1946

It has been admitted by the pleadings and stipulations herein that plaintiff, during the period of his employment with defendant was employed in interstate commerce within the meaning of the Fair Labor Standards Act. Defendant has contended that plaintiff was employed in an Administrative capacity and therefore not subject to the provisions of said Act.

From the evidence it appears that plaintiff was not an administrative employee, and not in an exempt classification, and is entitled to overtime, liquidated damages and attorneys fees.

Counsel have stipulated concerning the amounts to which plaintiff is entitled for the period up to and including the work week ending January 15, 1944, and have further stipulated as to the number of hours over forty worked by plaintiff each week from January 15, 1944 until the termination of plaintiff's employment with defendant. [14]

Counsel have further stipulated that if plaintiff is not in an exempt classification, the court should adopt one of two theories concerning the amount due plaintiff per hour for such overtime work, and each counsel has prepared a computation regarding the amounts due under the theory which he contends is correct. It appears to us the computation prepared by plaintiff should be adopted.

Counsel for plaintiff will prepare findings and judgment in accordance with this order, and present the same within

10 days from date hereof, leaving a blank space for the amount of attorneys' fees.

Counsel for both parties will communicate with the Court's law clerk to arrange a date upon which the Court may consider evidence concerning what amount constitutes a reasonable attorneys fee to be awarded counsel for plaintiff herein.

Copies to counsel. [15]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial before the above entitled Court, Hon. Jacob Weinberger, Judge Presiding, on April 4, 5 and 9, 1946, the plaintiff being present in person and by his counsel Perry Bertram of Weinstein & Bertram, and the defendant being represented by its counsel Samuel S. Gill and Robert H. Sanders of Thelen, Marrin, Johnson & Bridges, Samuel S. Gill and Robert H. Sanders, and both parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted briefs, and having been fully heard, and the cause having been submitted,

The Court, being fully advised, makes the following

FINDINGS OF FACT.

1. This action was brought by the plaintiff to recover from the defendant unpaid overtime wages and liquidated damages as provided [16] by the Fair Labor Standards

Act of 1938 (Public No. 718, 75th Cong., Ch. 676. 52 Stat. 1060-1069 (1938), 29 U.S.C., Sec. 201-219) hereinafter referred to as the Act.

2. At all times mentioned in these Findings, Defendant was a corporation duly organized under the laws of the State of Delaware, authorized to do business in California, and having and operating a shipyard located at Wilmington, California, within the territorial jurisdiction of this Court, where it was engaged in producing ships. All of the ships produced by the Defendant were, upon their completion, delivered at said shipyard to the United States Maritime Commission, which thereafter transported, delivered or took said ships from the State of California to points outside the State of California.

3. From prior to the week ending April 10, 1943, until July 31, 1944, plaintiff was employed by the defendant at and about its said shipyard in Wilmington, California, in the capacity of labor recruiter, in which capacity plaintiff was employed by the defendant in the production of said ships and in processes and occupations necessary to said production of ships.

4. From the week ending April 10, 1943, to and including the week ending September 18, 1943, plaintiff was employed by defendant at an hourly rate of \$1.03, and received each week the sum of \$53.56, which paid for forty (40) hours at straight time and eight (8) hours at time and one-half. From the week ending September 25, 1943, to and including the week ending January 15, 1944, plaintiff was employed by the defendant at an hourly rate of \$1.13, and received each week the sum of \$58.76, which paid for forty (40) hours at straight time, plus eight (8) hours at time and one-half. During both of these pe-

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riods he received no compensation for hours worked by him in excess of forty-eight (48) in a work week.

5. From the week ending January 22, 1944, to and including July 31, 1944, plaintiff was employed by defendant at a monthly salary of \$275.00 and received each week the weekly equivalent of that monthly [17] salary, or the sum of \$63.46, which paid for forty-eight (48) hours at straight time. During this period he received no additional half time for hours worked by him in excess of forty (40) in a week, and received no compensation for hours worked by him in excess of forty-eight (48) in a work week.

6. During the period mentioned in Finding 5, the monthly salary therein mentioned was paid with the understanding of both parties that it covered and compensated for forty-eight (48) hours of work per week, that if less than forty-eight hours should be worked in any week, the plaintiff's compensation would be reduced by one-forty-eighth ($1/48$) of his weekly pay for each hour under forty-eight that his hours of work totaled, and that if more than forty-eight hours should be worked in any week, no additional compensation would be paid for such excess hours over forty-eight. Accordingly, during this period, plaintiff's monthly salary reduced to an hourly rate was \$1.32 per hour.

7. The parties have stipulated to the number of overtime hours worked by plaintiff in each work week from June 5, 1943, to and including January 15, 1944, and the Court hereby finds, in accordance with that stipulation, that during said period plaintiff worked $178\frac{1}{4}$ overtime hours in excess of forty-eight (48) in a week.

8. The parties have stipulated that the amount of overtime compensation which should have been, but was not, paid during the period from the week ending June 5, 1943, to and including the week ending January 15, 1944, is the sum of \$295.85 and the Court so finds.

9. The parties have stipulated to the number of overtime hours worked by plaintiff in each work week from the week ending January 22, 1944, to and including July 31, 1944, and the Court finds, in accordance with that stipulation, that during said period plaintiff worked 511.25 hours in excess of forty (40) in a week, of which 303.25 hours were hours worked in excess of forty-eight (48) in a week.

10. The parties have stipulated that should the Court find [18] that plaintiff's monthly salary paid him for forty-eight (48) hours worked each week, the amount of overtime which should have been, but was not paid, during the period from the week ending January 22, 1944, to July 31, 1944, is the sum of \$736.75, and the Court so finds.

11. At no time during his employment by the defendant, did plaintiff regularly and directly assist an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the Regulations of the Administrator of the Wage-Hour Division of the United States Department of Labor), where such assistance was nonmanual in nature or required the exercise of discretion or independent judgment.

At no time during his employment by the defendant, did plaintiff perform under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along spe-

cialized or technical lines requiring special training, experience, or knowledge, or which required the exercise of discretion and independent judgment.

At no time during his employment by the defendant, did plaintiff's work involve the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion or independent judgment.

12. Plaintiff has employed the firm of Weinstein & Bertram to prosecute this action on his behalf, and said firm has rendered legal services to the plaintiff herein, and the sum of \$400.00 is a reasonable amount to be allowed for such services.

From the foregoing Findings, the Court draws the following

CONCLUSIONS OF LAW.

1. Jurisdiction of this action is conferred upon the Court by the Act and by Section 24 (8) of the Judicial Code (28 U.S.C. §41(8)).

2. From April 10, 1943, to July 31, 1943, the period involved in this action, plaintiff was employed by the defendant in the [19] production of goods for interstate commerce and in processes and occupations necessary to such production within the meaning of the Act.

3. At no time while employed by the defendant was plaintiff employed in a bona fide administrative capacity, within the meaning of Section 13(a)(1) of the Act.

4. For the period from April 10, 1943, to January 15, 1944, while plaintiff was employed at hourly rates of

pay, plaintiff is entitled to recover of the defendant the sum of \$295.85, as and for unpaid overtime wages, plus an equal amount as liquidated damages.

5. For the period from January 16, 1944, to July 31, 1944, while plaintiff was employed at a monthly salary, plaintiff is entitled to recover of the defendant the sum of \$736.75, as and for unpaid overtime wages, plus an equal amount as liquidated damages.

6. Plaintiff is further entitled to recover of the defendant the sum of \$400.00, ~~payable directly to Weinstein & Bertram,~~ as *an* for attorneys' fees for legal services rendered to the plaintiff in the prosecution of this action.

7. Plaintiff is further entitled to recover of the defendant his costs of suit incurred herein.

JACOB WEINBERGER

Judge

January 22, 1947

The foregoing Findings of Fact and Conclusions of Law are approved as to form.

January 20, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES and
SAMUEL S. GILL and ROBERT H. SANDERS
by Robert H. Sanders [20]

Received copy of the within Findings this 20 day of Jan., 1947. Robert H. Sanders, Attorney for Defendant.

[Copy received.]

[Endorsed]: Filed Jan. 23, 1947. [21]

16 *Joshua Hendy Corporation, a corporation, vs.*

In the District Court of the United States in and for the
Southern District of California

Central Division

Civil Action File No. 4747-W

JOSEPH D. KOURY,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION, a
corporation,

Defendant.

JUDGMENT

This cause having come on regularly for trial before the above entitled Court, Hon. Jacob Weinberger, Judge Presiding, on April 4, 5 and 9, 1946, the plaintiff being present in person and by his counsel Perry Bertram of Weinstein & Bertram, and the defendant being represented by its counsel Samuel S. Gill and Robert H. Sanders, of Thelen, Marrin, Johnson & Bridges, Samuel S. Gill and Robert H. Sanders, and both parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted briefs, and having been fully heard, and the cause having been submitted.

The Court having made its Findings of Fact and drawn its Conclusions of Law, orders judgment as follows:

It is Ordered, Adjudged and Decreed that Plaintiff have and recover of the Defendant the sum of \$1032.60, as overtime wages, the [22] further sum of \$1032.60, as and for liquidated damages, the further sum of \$400.00, as

and for attorneys' fees, and his costs of suit, taxed in the sum of \$39.88.

Dated: January 22, 1947.

JACOB WEINBERGER

Judge

Approved as to form:

January 20, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
SAMUEL S. GILL, ROBERT H. SANDERS

By Robert H. Sanders

Attorneys for Defendant.

Judgment entered Jan. 23, 1947. Docketed Jan. 23, 1947, Book 41, Page 439. Edmund L. Smith, Clerk. By L. B. Figg, Deputy. [23]

Received copy of the within Judgment this 20 day of Jan., 1947. Robert H. Sanders, Attorney for Defendant.

[Copy received.]

[Endorsed]: Filed Jan. 23, 1947. [24]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that California Shipbuilding Corporation, defendant in the action above named appeals to the Circuit Court of Appeals for the Ninth Circuit from a portion of the final judgment entered in this Court on January 23, 1947; said portion of the final judgment being appealed is in the amount of Seven Hundred

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Thirty-six and 75/100 Dollars (\$736.75) as overtime wages, and Seven Hundred Thirty-six and 75/100 Dollars (\$736.75) as liquidated damages, said sums being awarded for Joseph D. Koury's employment by defendant from January 16, 1944 to July 31, 1944.

Dated: April 16, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES

ROBERT H. SANDERS

Attorneys for Defendant.

[Endorsed]: Filed: Mld. copy to Weinstein & Bertram Apr. 17, 1947. [25]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 39 inclusive contain full, true and correct copies of Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938; Answer to Complaint; Stipulation of Facts; Minute Order Entered December 31, 1946; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Undertaking for Costs on Appeal; Designation of Contents of Record and Statement of Points; Plaintiff's Designation of Additional Contents of Record on Appeal; Stipulation re Record on Appeal; Stipulation and Order Changing Name of De-

fendant and Amended Statement of Points on Appeal which, together with copy of Reporter's Transcript and Original Plaintiff's Exhibit 7 and Defendant's Exhibits D, F, G and H, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 22 day of May, A. D. 1947.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Endorsed]: No. 11636. United States Circuit Court of Appeals for the Ninth Circuit. Joshua Hendy Corporation, a corporation, Appellant, vs. Joseph D. Koury. Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed May 23, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

20 *Joshua Hendy Corporation, a corporation, vs.*

In the Circuit Court of Appeals of the United States
In and for the Ninth Circuit

No. 11636

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

JOSEPH D. KOURY,
Appellee.

APPELLANT'S POINTS ON APPEAL AND
DESIGNATION OF RECORD

Appellant in the above-entitled action, in compliance with Rule 19, Subdivision 6, of the Rules of Practice of the above-entitled Court, herewith submits its Points on Appeal and Designation of Record for Appeal.

APPELLANT'S STATEMENT OF POINTS

I.

The Court's Judgment is contrary to and inconsistent with its Findings of Fact relating to Appellee's employment from January 16, 1944 to July 31, 1944, in the following particulars:

A. The Court erred in awarding any amount to Appellee for hours worked by him beyond 48 hours per work-week during said period;

B. The Court lacked jurisdiction to make any award for hours worked by Appellee beyond 48 hours in any work-week during said employment period;

C. The Court erred in awarding liquidated damages in any amount for said employment period.

II.

The Court's Findings of Fact are insufficient in that there are no findings determining whether (a) the activities performed during said employment period for which judgment was rendered were compensable activities by express contract or custom or practice during the various workweeks within which said activities were performed; (b) the Appellant's violation of the Fair Labor Standards Act was in good faith.

* * * * *

Dated: June 2, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
SAMUEL S. GILL

Attorneys for Appellant

Address:

215 West Sixth Street (1004)
Los Angeles 14, California

Received copy of the within Appellant's Points on Appeal and Designation of Record this 2nd day of June, 1947. Weinstein, Bertram & Vogel, by Perry Bertram. Attorneys for Appellee.

[Endorsed]: Filed Jun. 3, 1947. Paul P. O'Brien, Clerk.